Rightmove Sdn Bhd v YWP Construction Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO KCH-22C-1/9 OF 2013
MAIRIN IDANG JC
20 MARCH 2014

Arbitration — Stay of proceedings — Grant of — Parties entered into contract works and for sand-fillings project — Whether contract contained arbitration clause — Whether dispute ensue between parties — Whether breach of agreement — Whether application for stay of proceedings to enable reference to arbitration

The plaintiffs filed an action against the defendants for the sum of RM3,371,730.60 being claim for payments for the contract works and for sand-fillings for a project ('the project'). The contract contained an arbitration clause. The second defendant had appointed the first defendant as its sole contractor for the project and in turn, the first defendant had appointed the plaintiffs as their sole subcontractor to carry out all the work under the project. The first defendant was to pay the plaintiffs their entitlement of the payments within seven days of the first defendant's receipt from the employer of any payments following the issue of any interim certificates of payment under the main contract ('the contract work agreement'). The second defendant under a guarantee and indemnity agreement, inter alia, agreed as surety and principal debtor to pay all contract price under the contract work agreement which the plaintiff was entitled in the event the first defendant breached the payment terms and conditions of the said contract work agreement. There were two applications in this case namely for a stay of proceeding by the defendant to enable the plaintiffs claim to be referred to arbitration ('encl 4) and for summary judgment ('encl 6').

Held, allowing encls 4 and 6:

(1) There was a dispute between the plaintiff and the defendants on the said claim and surely such dispute was within the ambit of the arbitration clause. The arbitration was to be completed within one year from the date of this order with liberty to apply. The conditions requisite to the granting of stay of proceedings where there is an arbitration agreement are: the current proceedings are in respect of a matter which is the subject of the arbitration agreement; and the applicant had not taken any other steps in the proceedings. Once these are met, the court would mandatorily be required to refer the parties to arbitration unless the plaintiff could show that the agreement was null and void, inoperative or incapable of being performed (see paras 8, 14 & 17).

(2) The first defendant had fulfilled the following pre-condition: the proceedings have been brought before the court; there was an agreement between the parties which contains an arbitration clause; and the applicant has not taken any other steps in the proceedings. The plaintiffs could only challenge the defendant's application for a stay if he could establish the agreement between the parties was null and void, inoperative or incapable of being performed. There was nothing of that sort in this case. The court did not delve into it as it was not the plaintiff's case that the agreement was null and void, inoperative or incapable of being performed. Even if the agreement had been terminated, a stay of proceeding would still be allowed (see para 16).

[Bahasa Malaysia summary

Plaintif-plaintif memfailkan tindakan terhadap defendan-defendan untuk sejumlah RM3,371,730.60 sebagai bayaran untuk kerja kontrak dan untuk pemenuhan pasir bagi projek ('projek'). Kontrak mengandungi klausa timbang tara. Defendan kedua telah melantik defendan pertama sebagai satu-satunya kontraktor untuk projek tersebut dan defendan pertama pula telah melantik plaintif-plaintif sebagai satu-satunya subkontraktor untuk menjalankan kesemua kerja di bawah projek tersebut. Defendan pertama dikehendaki membayar plaintif-plaintif hak mereka terhadap bayaran dalam masa tujuh hari defendan pertama menerima daripada majikan apa-apa bayaran berikutan pengeluaran apa-apa sijil *interim* bayaran kontrak utama ('perjanjian kerja kontrak'). Defendan kedua di bawah perjanjian jaminan dan indemniti, antara lain, bersetuju sebagai penghutang penjamin dan utama untuk membayar kesemua harga kontrak di bawah perjanjian kerja kontrak yang mana plaintif berhak jika defendan pertama memungkiri syarat dan terma bayaran perjanjian kerja kontrak tersebut. Terdapat dua permohonan di dalam kes ini iaitu penangguhan prosiding oleh defendan untuk membolehkan tuntutan plaintif-plaintif dirujuk kepada timbang tara ('lampiran 4) dan untuk penghakiman terus ('lampiran 6').

Diputuskan, membenarkan lampiran 4 dan 6:

(1) Terdapat pertikaian di antara plaintif dan defendan-defendan atas tuntutan tersebut dan semestinya pertikaian sedemikian adalah dalam skop klausa timbang tara tersebut. Timbang tara tersebut mestilah diselesaikan dalam masa satu tahun dari tarikh perintah ini dengan kebebasan untuk memohon. Syarat-syarat diperlukan untuk memberikan penangguhan prosiding di mana terdapat perjanjian timbang tara adalah: prosiding semasa adalah berkaitan perkara yang mana adalah subjek perjanjian timbang tara; dan pemohon tidak mengambil apa-apa langkah lain dalam prosiding. Apabila ini dipenuhi, mahkamah akan secara mandatori dikehendaki untuk merujuk pihak-pihak kepada timbang tara kecuali plaintif dapat menunjukkan

bahawa perjanjian adalah batal dan tak sah, tidak berjalan atau tidak dapat dilaksanakan (lihat perenggan 8, 14 & 17).

(2) Defendan pertama telah memenuhi prasyarat berikut: prosiding telah dibawa di hadapan mahkamah; terdapat perjanjian di antara pihak-pihak yang mengandungi klausa timbang tara; dan pemohon tidak mengambil apa-apa langkah lain dalam prosiding. Plaintif-plaintif hanya dapat membantah permohonan defendan untuk penangguhan jika dia dapat membuktikan perjanjian di antara pihak-pihak adalah batal dan tak sah, tidak berjalan atau tidak dapat dilaksanakan. Tidak terdapat apa-apa sedemikian dalam kes ini. Mahkamah tidak menyelidikinya kerana ia bukan kes plaintif bahawa perjanjian adalah batal dan tak sah, tidak berjalan atau tidak dapat dilaksanakan. Meskipun perjanjian ditamatkan, penangguhan prosiding akan masih dibenarkan (lihat perenggan 16).]

Notes

For cases on grant of, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2056–2059.

Cases referred to

Agibs Engineering & Construction Sdn Bhd v Paragon Advance Solutions Sdn Bhd [2011] 1 LNS 1019, CA (refd)

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd)

KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2012] MLJU 839; [2013] 1 CLJ 993, HC (folld)

Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2) [1999] 2 MLJ 609; [1999] 2 CLJ 988, HC (refd)

Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634; [2009] 1 LNS 278, HC (refd)

Legislation referred to

Arbitration Act 2005 s 10(1), 10(1)(a), (b)

Beatrix Ng (CJ Eng Advocates) for the plaintiff.
Alvin Yong (Chong Brothers Advocates) for the defendants.

Mairin Idang JC:

INTRODUCTION

[1] On 13 September 2013 the plaintiffs filed an action against the defendants for the sum of RM3,371,730.60 being claim for payments for the contract works and for sand-fillings. The plaintiffs had pleaded that the second

defendant was the main contractor appointed by the government for the project described as 'Cadangan Projek Pembinaan, Penaiktarafan Dan Pembaikanpulihan Sekolah Sekilah Dan Asrama Di Negeri Sarawak, Sekolah Kebangsaan Beladin (30BD, 2BD, J-QAF & 15 RG) Di atas Lot 753, Blok 15, Sablor Land District, Betong, Sarawak' ('the project'). It was also pleaded that the second defendant had appointed the first defendant as it sole contractor for the project and in turn the first defendant vide an agreement dated 17 May 2010 had appointed the plaintiffs as their sole subcontractor to carry out all the work under the project. It was also agreed that the first defendant was to pay the plaintiffs their entitlement of the payments within seven days of the first defendant's receipt from the employer of any payments following the issue of any interim certificates of payment under the main contract ('the contract work agreement'). The second defendant under a guarantee and indemnity agreement, inter alia, agreed as surety and principal debtor to pay all contract price under the contract work agreement which the plaintiff was entitled in the event the first defendant breached the payment terms and conditions of the said contract work agreement. Both defendants had entered appearance.

TWO APPLICATIONS

[2] There are two applications before me. Enclosure 4 is for a stay of proceeding. Enclosure 6 is for summary judgment.

[3] Enclosure 4 is the defendants' application for a stay of the proceedings to enable the plaintiff's claim to be referred to arbitration. The plaintiff does not dispute the existence of the arbitration clause. Arbitration is in cl 29.1 of the subcontractor contract.

[4] Enclosure 6 was the plaintiff's application for summary judgment. Essentially, the plaintiffs are saying the defendants have no defence and that final judgment should be entered for the plaintiffs against the first and/or second the amount of RM3,571,730.60 ('the plaintiffs' claim').

[5] The question that I ask myself is whether I should hear the plaintiff's application for summary judgment (encl 6) or the stay's application (encl 4). I think the logical approach is to hear the stay's application first and only if I do not grant the stay I should then proceed to hear the summary application. But both applications should not be heard together (*Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2)* [1999] 2 MLJ 609; [1999] 2 CLJ 988).

ARBITRATION CLAUSE

[6] The contract work agreement contains an arbitration clause namely cl 29.1 which states as follows:

ARBITRATION

If any question, *dispute* or difference shall arise The MC and The SC whether arising during the execution or after the completion or abandonment of the Sub Contract Works or after the determination of the employment of subcontractor under this agreement (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Agreement or in connection therewith, then either party shall give to the other notice in and is hereby referred to the arbitration or failing such agreement as may be appointed by the Kuala Lumpur Regional centre for Arbitration on the request of either party and in either case the arbitration shall be carried out in accordance with the provisions of the Arbitration Act 2005 and to be held in Kuching. The award of such arbitrator shall be final and binding on the parties. (Emphasis added.)

ANY DISPUTE?

[7] The plaintiff's claim is basically for the sum of RM3,371,730.60 ('the said claim'). The plaintiffs say that the said claim is made up of payments due under the interim payments certificates which is RM2,431,730.60 and for works done for sand filling amounting to RM1,140,000. The defendants in their respective affidavits had disputed the plaintiff's said claim on the basis that the interim payment certificates did not truly reflect the status of accounts between the parties and the interim certificates are not final account. The defendants also disputed the claim for the sand filling as to do so would amount to a double claim. The first defendants denied that it had prepared exh P7 (summary of overall payments) and asserted that exh P7 was prepared by the plaintiff and the computation therein was not approved by the defendants. The second defendant also states that by reason of the dispute of the amount arising between the plaintiff and the first defendant which has to go for arbitration. The plaintiff's action against the second defendant is premature under the alleged guarantee indemnity. The defendants had also asserted that the termination of the project by the government was partly due to the plaintiff and as such the first defendant was also entitled to claim the sum of RM1,426,929 from the plaintiff due to the non completion of the project. This too would have to go for arbitration.

[8] I have read the statement of claim, the defendants' application (encl 4), the parties' affidavits and submissions. Clearly there is a dispute between the plaintiff and the defendants on the said claim. There is a dispute otherwise the parties would not be here. Surely such dispute is within the ambit of the arbitration clause.

[9] For convenience, I shall now look at the present amended s 10(1) of the Arbitration Act 2005 (Amendment PU(B) 342 of 2011 wef 1 July 2011) which reads as follows:

10 (1) A court before which proceedings are brought in respect of a matter which is

the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration *unless it finds that the agreement is null and void, inoperative or incapable of being performed.* (Emphasis added.)

[10] Now before the amendment s 10(1) of the Act reads as follows:

A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration *unless* it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(Emphasis added.)

[11] Thus, as the law stands the July 2011 amendments did not bring major *changes except for the deletion of para (b) of sub-s (1).* (Emphasis added.)

[12] The Court of Appeal considered the pre-amendment s 10(1) of the Act in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785 and held that once the preconditions for referring the matter to arbitration under the section are met, the court is duty bound to refer the parties to arbitration. The only way the court can refrain from making the order for stay is if the statutory exceptions provided in s 10(1)(a) and (b) are applicable. T Selventhiranathan JCA puts it this way at pp 806–807:

[71] To my mind, the claim under the June contract is 'in respect of a matter which is the subject of an arbitration agreement' to fall squarely within the first precondition to refer the matter to arbitration under s 10(1). The defendant in the present case did not take any step in the proceedings in relation to that matter, ie, the June contract, but instead filed its application for a stay, thereby fulfilling the second precondition for s 10(1) to apply.

[72] In the foregoing circumstances the court was duty-bound to stay the proceedings in relation to the matter and refer the parties to arbitration. The only way the court could refrain from making the order for stay would be if it found, ... the following exceptions to be applicable:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[13] The same provision was also considered in *Winsin Enterprise Sdn Bhd v*

Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634; [2009] 1 LNS 278 where Mary Lin JC, as she then was, stated at p 638:

> From a reading of s 10(1) it also appears that it must first be determined whether the current proceedings are in respect of a matter which is the subject of an arbitration agreement. If the answer is in the affirmative and the applicant has not taken any other steps in the proceedings the court is mandatorily required to refer the parties to arbitration.

[14] Thus, from a reading of s 10(1) of the Act in its current form and the case authorities referred to above, it appears to me that the conditions requisite to the granting of stay of proceedings where there is an arbitration agreement are: (i) the current proceedings are in respect of a matter which is the subject of the arbitration agreement and (ii) the applicant has not taken any other steps in the proceedings. Once these are met, the court is *mandatorily* required to refer the parties to arbitration *unless the plaintiff can show that the agreement is null and void, inoperative or incapable of being performed.* On mandatory I find support in the case of *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2012] MLJU 839; [2013] 1 CLJ 993 *telah diputuskan seperti yang berikut*:

> 16 It is also evident with the amendment that it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, 'null and void, inoperative or incapable of being performed'.
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> 17 It is no longer possible to argue that in respect of the controversy between the parties there is no 'dispute' with regard to the matter to be referred to arbitration, which is a test which invites unnecessary ambiguity and requires the court to determine whether there is a 'dispute' between the parties not dissimilar to the function performed by the court in determining whether there is a triable issue in a summary judgment application. The test is now simpler test of whether the matter before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, if will become a matter of construction of the relevant arbitration agreement, where it exists.

[15] Now in our instant case I cannot see any averments in the statement of claim or the plaintiff's affidavit that said the 'Contract Work Agreement as being null void, inoperative or incapable of being performed'.

[16] For our purposes, learned counsel for the plaintiffs in his submission said that in 3.3 'However, the 1st defendant has failed to identify what are the disputes which necessitate or should be referred to arbitration.' Surely such assertion could only stand in the old s 10(1) (see para (10) hereinabove) we are here dealing with the amended s 10(1) (see para (14) hereinabove). From the short history of the case the first defendant had fulfilled the following pre-condition: (i) the proceedings have been brought before the court; (ii) there was an agreement between the parties which contains an arbitration clause and

(iii) the applicant has not taken any other steps in the proceedings. The plaintiffs can only challenged the defendant's application for a stay if he could establish the agreement between the parties is null and void, inoperative or incapable of being performed. There is nothing of that sort here. I do not see this being raised in the plaintiff's affidavit. I shall not delve into this as it is not the plaintiff's case that the agreement was null and void, inoperative or incapable of being performed. But I need only say even if the agreement has been terminated a stay of proceeding would still be allowed under s 10 (see *Agibs Engineering & Construction Sdn Bhd v Paragon Advance Solutions Sdn Bhd* [2011] 1 LNS 1019).

CONCLUSION

[17] That said I allow the defendant's application in encl 4. Likewise I also order a stay in respect of encl 6. I further order that the arbitration is to be completed within one year from the date of this order with liberty to apply. Costs in the cause.

Enclosures 4 and 6 allowed.

Reported by Afiq Mohamad Noor